

STUART RABNER, ATTORNEY	:	SUPERIOR COURT OF NEW JERSEY
GENERAL OF NEW JERSEY,	:	CHANCERY DIVISION-OCEAN COUNTY
	:	DOCKET NO. _____
and	:	
	:	
THE STATE OF NEW JERSEY,	:	Civil Action
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
MICHAEL GINALDI, et al.	:	
	:	
Defendants.	:	
	:	
	:	

**BRIEF OF PLAINTIFFS IN SUPPORT OF THEIR ORDER TO SHOW CAUSE**

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PRELIMINARY STATEMENT

"With the purpose of preventing damage to the shores and beaches of the United States . . . , it is hereby declared to be the policy of the United States . . . to promote shore protection projects and related research that encourage the protection, restoration, and enhancement of sandy beaches, including beach restoration and periodic beach nourishment, on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprises." 33 U.S.C. § 426e(a).

Long Beach Island ("LBI"), a narrow barrier island in Ocean County stretching approximately eighteen (18) miles along the Atlantic Ocean, is subject to constant erosion and the threat of severe coastal storms, thereby damaging a natural resource valuable to all the citizens of the State and threatening the safety and property of LBI residents. The New Jersey Department of Environmental Protection ("DEP") and the United States Army Corps of Engineers ("Army Corps") have responded to these threats by agreeing to implement the LBI Shore Protection Project (the "Project") - a 17-mile beach nourishment and replenishment project to protect the public health, safety, and economies of the shore communities on LBI.

By statute, the DEP is authorized to "undertake any and all actions and work essential" to fulfill its duty to protect the

State's coast from the damaging effects of coastal storms. N.J.S.A. 12:6A-1. Here, the DEP seeks to use this authority to gain immediate access to five private properties in the Borough of Surf City because Defendants, the owners of these properties, have not provided the access necessary for Project construction. The DEP seeks access to the Defendants' properties to abate what is, in effect, a public nuisance - i.e., a dune and beach system that provides inadequate protection from coastal storms that are a real and serious threat to Long Beach Island. The State intends to protect its citizens from this threat through the Project, which involves the extraction of public sand from an offshore borrow site on the ocean floor, and using the sand to enhance the existing dunes and widen the existing flat beach to protect against erosion and destruction caused by hurricanes, tropical storms, "nor'easters," and other coastal storms.

The Army Corps and the DEP have determined that construction should begin in Surf City, based upon their evaluation of various factors relevant to the successful construction of the Project. As part of the Project, the Army Corps requires DEP to provide access to the properties where the work will be performed, both for initial construction and subsequent replenishment activities, and perpetual easements preserving the project footprint for public use. Because the part of the Project funded for construction this fall/winter

requires dune enhancement on twenty-five oceanfront properties owned by private individuals (as well as municipally-owned land) in the Borough of Surf City, the DEP must obtain access to these properties. While twenty oceanfront property owners have signed the necessary easements, Surf City and the DEP have been unable to obtain the required easements from the Defendants - five oceanfront property owners out of the twenty-five private properties in this section of the Project.

At its core, this case involves the efforts of the State and Federal governments to abate a public nuisance to protect public and private property and the State's citizens from the ravages of coastal storms. Defendants' failure to grant access frustrates these efforts, threatening the Army Corps' and DEP's ability to complete the Project and potentially jeopardizing future funding of the Project. Thus, Plaintiffs seek an order from this Court granting immediate access to allow the Project to proceed.

## STATEMENT OF FACTS

### A. Risks Associated with Coastal Storms

Coastal storms are a constant threat to the New Jersey shore. Coastal storms, which include hurricanes, other tropical storm systems and "nor'easters," can produce extremely high winds, torrential rain (leading to flash floods), and tornadoes, and can drive oceanic storm surges onto coastal areas with catastrophic effects. (Certification of Thomas Herrington, Ph.D. ("Herrington Cert.") ¶ 4.) Coastal storms on the open seas produce large waves, heavy rains, and high winds, and can cause devastating effects when they make landfall. (Herrington Cert. ¶ 5.)

Coastal storms that make landfall can, among other things, directly damage or destroy buildings, vehicles, roads and bridges, and cause an increase in sea level. (Herrington Cert. ¶ 6.) More importantly, coastal storms can result in loss of human life or serious injury or illness due to drowning, flying debris, the infusion of disease (particularly when the destruction of sanitation facilities occurs during warm summer weather), outbreak of infections due to wading in sewage-polluted standing water, fires caused by damaged buildings and utilities, power outages that disrupt vital communication and hamper rescue efforts, and the destruction of access ways

complicating efforts to transport necessities such as food, clean water, temporary shelters, and medicine. (Herrington Cert. ¶ 8.)

**B. Erosion Potential and Storm Frequency on LBI**

The State of New Jersey, and LBI in particular, repeatedly have suffered the damaging effects of coastal storms. In 1944 and 1962, catastrophic storms battered LBI, causing houses to float off their foundations, washing away whole sections of beach, and cutting new inlets through the island. (Herrington Cert. ¶ 13.) The 1962 storm stands as the most devastating coastal storm in New Jersey's recorded history, drowning seven people, uprooting over 600 houses, and tearing LBI into six pieces. (Herrington Cert. ¶ 15.)

After a period of almost thirty years of relative calm following the 1962 storm, a series of three very destructive storms struck the New Jersey coast over the fifteen months from October 1991 to December 1992. (Herrington Cert. ¶ 16.) The last of these storms was the most significant "nor'easter" to occur since 1962. (Ibid.) Coinciding with a full lunar eclipse and lasting for 140 hours and twelve tidal cycles, elevated water levels persisted for over five days. (Ibid.) Waves in excess of thirty feet were measured offshore. (Ibid.) The combination of large waves and elevated water level once again

completely eroded the beaches and breached the coastal dunes. (Ibid.) New Jersey sustained damage of approximately \$500 million (1992 value) from the storm, one quarter of which occurred on LBI. (Ibid.)

In addition to such massive storms, smaller, more frequent storm events also take an erosive toll on the LBI shoreline. (Herrington Cert. ¶ 17.) Most recently, storms causing significant flooding and property damage struck the New Jersey coast in 1994, 1996, and 1998. (Ibid.) While no major storms have struck coastal New Jersey since the 1992 storm, large storms tend to be clustered together in a relatively short period of years. (Ibid.)

**C. Congressional Authorization to Undertake Shore Protection Measures**

Due to the constant coastal erosion caused by storms large and small, certain beaches and dunes need to be replenished to protect shore communities. (Herrington Cert. ¶ 9; Certification of David Rosenblatt ("Rosenblatt Cert.") ¶ 14.) The United States Congress has recognized that conservation, protection, and development of the nation's beaches is a vital national interest:

With the purpose of preventing damage to the shores and beaches of the United States, its Territories and possessions and promoting and encouraging the healthful recreation of the

people, it is hereby declared to be the policy of the United States, subject to this Act, to promote shore protection projects and related research that encourage the protection, restoration, and enhancement of sandy beaches, including beach restoration and periodic beach nourishment, on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprises. [33 U.S.C. § 426e(a)].

The Army Corps is the Federal entity that undertakes these shore protection projects. (Rosenblatt Cert. ¶ 14.) Such projects are authorized in the federal Water Resources Development Acts ("WRDA"), which Congress has passed every few years to authorize and direct the hundreds of projects undertaken by the Army Corps. See, e.g., WRDA of 2000, Pub. L. No. 106-541, 114 Stat. 2572.

**D. Shore Protection in New Jersey**

In New Jersey, the DEP, through its Bureau of Coastal Engineering, operates New Jersey's Shore Protection Program. (Rosenblatt Cert. ¶ 4.) The Shore Protection Program was created to protect life and property along the New Jersey coast, preserve the vital coastal resources of New Jersey, and maintain safe and navigable waterways throughout the State. (Ibid.) To that end, the Bureau of Coastal Engineering administers shore protection and coastal dredging projects throughout the State. (Ibid.)

The Legislature has granted the DEP broad authority over all State shore protection efforts. Specifically, N.J.S.A. 12:6A-1 authorizes and empowers the DEP to:

repair, reconstruct, or construct bulkheads, seawalls, breakwaters, groins, jetties, beachfills, dunes and any or all appurtenant structures and work, on any and every shore front along the Atlantic ocean, in the State of New Jersey . . . to prevent or repair damage caused by erosion and storm, or to prevent erosion of the shores and to stabilize the inlets or estuaries and to undertake any and all actions and work essential to the execution of this authorization and the powers granted hereby. [N.J.S.A. 12:6A-1] [emphasis added].

New Jersey's Shore Protection Program often involves participation in shore protection projects that are authorized by the United States Congress and managed by the Army Corps. (Rosenblatt Cert. ¶ 5.) In such Federal projects, the State of New Jersey serves as the "non-Federal Sponsor," which requires the State to provide 35% of the project funding and perform other project-related tasks. (Ibid.) See also 33 U.S.C. § 2213(c)(5). The State's portion of the funding is then allocated through a cost-sharing agreement where the local municipalities involved in the project contribute 25% of the State's share. (Rosenblatt Cert. ¶ 5.)

Beach nourishment and replenishment projects begin with the initial placement of sand along beach and dunes that have experienced erosion. (Rosenblatt Cert. ¶ 21.) Sources of sand

for such projects can include a local source such as a neighboring beach or sandbar, a dredged source such as a nearby inlet or waterway, an inland source such as a mining quarry or, as used most commonly in large-scale projects, an offshore source such as a borrow site along the ocean bottom. (Ibid.) This sand can be brought in with trucks or barges, hydraulically pumped, or any combination of the above, and is then spread evenly along the beach and piled up into dunes stabilized with snow fences and dune grass. (Ibid.) These beach nourishment projects generally extend many years beyond the initial placement of sand because, as nourished beaches undergo erosion, they must be maintained and restored through beach re-nourishment. (Ibid.)

Running parallel to the shoreline, coastal dunes play a vital role in protecting the land, along with its inhabitants and structures, against the high potential for dangerous surf and storm surge caused by significant storm events and other erosive factors. (Rosenblatt Cert. ¶ 13; Herrington Cert. ¶ 7.)

**E. LBI Shore Protection Project**

The LBI Shore Protection Project was formally authorized by the Water Resources and Development Act ("WRDA") of 2000, Pub. L. No. 106-541, 114 Stat. 2572, section 101(a)(1).<sup>1</sup>

The formal authorization of the LBI Shore Protection Project followed a multi-year study of the risks faced by this section of the New Jersey shore. The Project itself is the culmination of years of research and study by the Army Corps and the DEP of LBI's shoreline erosion problems. In March 1995, the Army Corps completed a preliminary study that identified possible solutions to the erosion problems facing LBI. (Rosenblatt Cert. ¶ 19.) This preliminary study also determined that an engineering solution was in the Federal interest. (Ibid.)

Based on the recommendations from the 1995 preliminary study, the Army Corps prepared the "Barnegat Inlet to Little Egg Inlet, New Jersey, Final Feasibility Report and Integrated Environmental Impact Statement, September 1999" ("Army Corps Feasibility Study"). (Rosenblatt Cert. ¶ 18.) The Army Corps Feasibility Study examined the magnitude and effect of shoreline erosion problems on LBI and identified beach nourishment as a

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<sup>1</sup> In the WRDA of 2000, the LBI Shore Protection Project is identified as the Barnegat Inlet to Little Egg Inlet, New Jersey Shore Protection Project. Pub. L. No. 106-541, 114 Stat. 2572, sec. 101(a)(1).

solution to these problems. (Ibid.)

The construction plan of the LBI Shore Protection Project consists of beach and dune construction using hydraulic pumping to transport sand from an offshore borrow site to the shoreline of the municipalities of Long Beach Township, Harvey Cedars, Surf City, Ship Bottom, and Beach Haven. (Rosenblatt Cert. ¶ 22.) According to the Army Corps Feasibility Study, this plan requires approximately 4.95 million cubic yards of sand for initial berm (i.e., beach) placement and 2.45 million cubic yards for dune placement. (Rosenblatt Cert. ¶ 23.) Approximately 1.9 million cubic yards of sand will be needed for periodic beach and dune replenishment every seven (7) years for the 50-year life of the project. (Ibid.)

In 2000, the total cost of the Project was estimated to be \$51,203,000, consisting of an estimated Federal cost of \$33,282,000 and an estimated non-Federal cost of \$17,921,000. This included an estimated average annual cost of \$1,751,000 for periodic nourishment over the 50-year life of the project, consisting of an estimated annual Federal cost of \$1,138,000 and an estimated annual non-Federal cost of \$613,000. WRDA of 2000, Pub. L. No. 106-541, sec. 101(a). (Rosenblatt Cert. ¶ 24.) Due to inflation and increased construction costs, the current estimated cost of the initial beach fill for the entire Project has risen from \$51,203,000 to approximately \$71,200,000, which

costs are to be shared 65% by the federal government and 35% by the State. (Rosenblatt Cert. ¶ 25.)

The DEP, as the non-federal sponsor for this project, signed a Project Cooperation Agreement ("PCA") with the Army Corps on August 17, 2005. (Rosenblatt Cert. ¶ 26.) The PCA serves as the framework for the joint effort by the Army Corps and the DEP for the Project's initial construction and periodic beach re-nourishment. Through the PCA, the Army Corps, who performs and/or contracts out construction of the Project, imposes a number of requirements upon DEP based on federal law. (Rosenblatt Cert. ¶ 27.)

Pursuant to the PCA and federal law, the Army Corps requires DEP to provide temporary access for initial construction, as well as perpetual easements granting access for future re-nourishment and for public use of the Project footprint. (Rosenblatt Cert. ¶ 28.) If the requirements set forth in the PCA are not met by the DEP, the Army Corps is capable of carrying forward previous years' funding. (Rosenblatt Cert. ¶ 31.) However, the Army Corps may decide not to fund the LBI Shore Protection Project in its entirety if work does not begin this fall, or if all currently allocated funds are not spent. (Ibid.) Presently, the Army Corps faces significant competing demands for funding, including shore protection projects in other vulnerable coastal areas of the United States,

as well as operations overseas. (Ibid.)

F. Surf City Section of the LBI Shore Protection Project

The Army Corps and the DEP have determined that construction should begin with the Surf City portion of the Project, based upon their evaluation of various factors relevant to the successful completion of Project. The factors include a number of engineering concerns, the availability of construction access, and the existence of adequate public access to the beach. (Rosenblatt Cert. ¶ 34.) From an engineering standpoint, a primary consideration is that the beach profile of Surf City is relatively stable and able to hold sand in place to serve as the primary foundation for replenishing the remaining portions of LBI as the entire Project proceeds. (Ibid.)

The Surf City section of the Project is broken down into two sub-sections: (1) an area running through approximately the southern two-thirds of Surf City, extending south from 18<sup>th</sup> Street to the Surf City-Ship Bottom border (the "Southern Surf City Project Area"); and (2) an area running through approximately the northern one-third of Surf City, extending north from 18<sup>th</sup> Street to 25<sup>th</sup> Street (the "Northern Surf City Project Area"). (Rosenblatt Cert. ¶ 42.) The Southern Surf City Project Area and the eastern part of the Northern Surf City Project Area are municipally owned, and Surf City has provided

the DEP with the required easement. (Rosenblatt Cert. ¶ 43.) In the Northern Surf City Project Area, however, some of the dune construction and enhancement will occur on parts of twenty-five oceanfront properties owned by private individuals.<sup>2</sup> (Rosenblatt Cert. ¶ 36.) Thus, pursuant to the PCA and federal law, the DEP must provide the Army Corps with access to the twenty-five properties in the Northern Surf City Project Area before construction can begin in this area. (Rosenblatt Cert. ¶ 54.)

On August 29, 2006, the Army Corps opened the contractors' bids for the initial phase of the Project. (Rosenblatt Cert. ¶ 60.) Based on the bids received and the Project funds available, the Army Corps and the DEP estimate that construction of both the Southern Surf City Project Area and the Northern Surf City Project Area can be completed this fall/winter. (Rosenblatt Cert. ¶¶ 57, 58.) At present, the Army Corps has authorized construction to begin in the Southern Surf City Project Area on November 1, 2006. (Rosenblatt Cert. ¶ 60.) In order for construction to proceed in the Northern Surf City Project Area this fall/winter, the Army Corps must authorize that construction by December 1, 2006. (Rosenblatt Cert. ¶ 61.)

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<sup>2</sup> Of course, the owners of oceanfront property will benefit most directly from the storm protection offered by the Project. Oceanfront properties are closest to and in the direct path of high surf and storm surges, and would suffer the most immediate and severe damage. (Herrington Cert. ¶ 23.)

However, as discussed below, the DEP has not received the necessary easements from all of the private property owners in the Northern Surf City Project Area. (Rosenblatt Cert. ¶ 54.)<sup>3</sup>

**G. Acquisition of the Necessary Easements in Surf City**

Surf City and the DEP have obtained the public use and temporary construction easements from twenty of the twenty-five oceanfront property owners within the Northern Surf City Project Area. (Rosenblatt Cert. ¶ 43.) However, Surf City and the DEP have been unable to obtain these required easements from five oceanfront property owners, the Defendants. (Rosenblatt Cert. ¶ 54.) Because work cannot be completed without access to the Defendants' properties, their refusal to provide access precludes completion of the Surf City portion of the Project. (Ibid.)

The DEP, in a joint effort with the Borough of Surf City, has been working to obtain the necessary easements for nearly a year. (Rosenblatt Cert. ¶ 44.) In late 2005, DEP

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<sup>3</sup> In early October, Plaintiffs learned that the U.S. Army Corps now has enough funding available to complete the Ship Bottom portion of the Project this fall/winter. (Rosenblatt Cert. ¶¶ 57, 58.) The Ship Bottom portion of the Project encompasses the entire length of Ship Bottom and requires access to a number of private properties. (Rosenblatt Cert. ¶ 57.) As with the Northern Surf City Project Area, the Army Corps must authorize construction by December 1, 2006. (Rosenblatt Cert. ¶ 62.)

representatives met with Surf City officials to discuss the Project and the need for access to municipal and private properties, and at that time the DEP provided Surf City with a list prepared by the Army Corps of the twenty-five private properties for which easements would be required. (Rosenblatt Cert. ¶ 45.) Thereafter, Surf City sent the owners of these twenty-five properties a letter, with an Army Corps-approved easement enclosed, requesting that they sign and return the easement. (Rosenblatt Cert. ¶ 46.)

Following this initial mailing, the State and the LBI municipalities conducted a number of meetings throughout LBI concerning the Project in general and the easements in particular. (Rosenblatt Cert. ¶ 47.) In spring 2006, Surf City sent the property owners an updated easement, which contained modifications made to address concerns raised by LBI residents in meetings and other communications with DEP and Surf City. (Rosenblatt Cert. ¶ 48.) Since that time, Surf City has been engaged in continuing efforts to obtain the easements from the twenty-five property owners in the Northern Surf City Project Area. (Rosenblatt Cert. ¶ 49.)

On August 31, 2006, easements had been obtained from the owners of fifteen of the twenty-five private properties in the Northern Surf City Project Area. (Rosenblatt Cert. ¶ 50.) On that date, with the commencement of construction approaching,

the State sent a letter to the owners of the ten properties for which easements had not been obtained, requesting that the easements be provided by Friday, September 8, 2006. (Rosenblatt Cert. ¶ 51.) Since that time, five additional easements have been obtained, leaving five properties for which court ordered access must be obtained. (Rosenblatt Cert. ¶ 52.) The remaining properties are the subject of this action.<sup>4</sup>

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<sup>4</sup> Plaintiffs anticipate that that they will be amending their complaint shortly to add as Defendants residents of the Borough of Ship Bottom who have not granted the access necessary for Project construction. After the State recently learned that sufficient funding would be available to complete the Ship Bottom portion of the Project this fall/winter, Plaintiffs notified Ship Bottom residents who have not yet provided the access necessary for the Project that they had until October 18, 2006 to do so. (Rosenblatt Cert. ¶ 57.) Any residents of Ship Bottom who have not provided the necessary access by October 18, 2006 will be added as Defendants in this action.

## ARGUMENT

### PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

A party seeking temporary injunctive relief must make a preliminary showing of: (1) irreparable injury unless relief is granted; (2) that the legal right underlying plaintiff's claim is settled; (3) a reasonable probability of ultimate success on the merits; and (4) that the balance of hardships favors granting the relief. See Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982).

Here, Plaintiffs seek an order granting immediate access to five private properties in the Borough of Surf City where Defendants, the owners of these properties, have not provided the access necessary to protect New Jersey's coastal inhabitants and the State's economy from the threat of coastal storms. As shown below, Plaintiffs meet their burden on each prong of the Crowe v. DeGioia test. Thus, Plaintiffs' request for temporary injunctive relief should be granted.

#### I. PLAINTIFFS HAVE DEMONSTRATED THAT AN IRREPARABLE INJURY WILL OCCUR UNLESS THE INJUNCTION IS GRANTED

In order to prevail on an order to show cause for a preliminary injunction, a plaintiff must show that it will suffer irreparable injury if the relief is not granted. Here, Plaintiffs clearly have satisfied their burden because Defendants' refusal to grant access undermines the Project and

deprives LBI residents of the storm protection offered by the Project.

"Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. Irreparable harm may be established in a number of circumstances. See, e.g., Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 398 (App. Div. 2006) (finding that injunctive relief may be appropriate where "a property owner's construction of improvements unreasonably causes flooding or other damage to a neighboring property"); Thomas P. Carney, Inc. v. Franklin Tp. Bd. Of Educ., 365 N.J. Super. 509, 514 (Law Div. 2003) (finding that a plaintiff alleging irregularities in the public bidding process had no adequate remedy at law "if the contract is not re-advertised and rebid, [because] the plaintiff will have lost the opportunity to have its bid accepted and receive a lucrative construction contract.").

Here, Plaintiffs face irreparable injury from the real and severe threat of damage from coastal storms should the Project not be completed, and the potential loss of funding should the easements not be obtained. In light of the extensive and continuous threat of severe coastal storms and erosion on LBI, this 17-mile project that will take over ten years to complete must move forward as expeditiously as possible. (Rosenblatt

Cert. ¶ 58.)<sup>5</sup> LBI is in danger from coastal erosion and storm events, and the Surf City portion of the Project must proceed as soon as available funding allows. In New Jersey, hurricanes and other tropical storm systems, as well as other Atlantic coastal storms such as "nor-easters," can produce extremely high winds, torrential rain (leading to flash floods), and tornadoes, and drive oceanic storm surges onto coastal areas with catastrophic effects. (Herrington Cert. ¶ 4.) This Project will provide much-needed protection to an otherwise fragile island, and will undoubtedly confer upon oceanfront properties direct storm protection benefits. (Herrington Cert. ¶ 23.)

Based on the bids received and the Project funds available, the Army Corps and the DEP estimate that construction on the Southern Surf City Project Area and the Northern Surf City Project Area can be completed this fall/winter. (Rosenblatt Cert. ¶¶ 57, 58.) At present, construction is scheduled to begin in the Southern Surf City Project Area on November 1, 2006. (Rosenblatt Cert. ¶ 60.) In order for construction to proceed on the Northern Surf City Project Area, the Army Corps must authorize that construction by December 1, 2006.

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<sup>5</sup> Further, the issues presented in this case are likely to recur throughout this Project, if not addressed immediately, because some oceanfront property owners in all LBI municipalities have, to this point, refused to permit the necessary access for construction, threatening the ability of the Army Corps and DEP to complete the Project. (Rosenblatt Cert. ¶ 59.)

(Rosenblatt Cert. ¶ 61.) However, as discussed below, the DEP has not received the necessary easements from all of the private property owners in the Northern Surf City Project Area. (Rosenblatt Cert. ¶ 54.)

Because construction cannot proceed, or even be authorized, until the DEP has obtained the necessary access, Defendants' failure to provide this access creates irreparable injury. Most immediately, if the Army Corps is unable to complete the Northern Surf City Project Area this fall/winter, portions of LBI that could receive beach nourishment immediately will go unprotected. (Rosenblatt Cert. ¶ 58.) Further, if the DEP and the Army Corps are unable to spend all currently allocated funds, this may jeopardize any future funding of this much-needed project on LBI. (Ibid.) Recovering these lost funds from the Defendants will be extremely difficult if not impossible, so monetary damages are not an alternative remedy for Plaintiffs. The potential loss of future funding and the devastating effects that coastal storms could have on LBI should the Project not be completed constitute irreparable injury.

## **II. THE LEGAL RIGHTS UNDERLYING PLAINTIFFS' CLAIMS ARE SETTLED**

A plaintiff seeking a temporary injunction is also required to show that the legal rights underlying its claims are settled. Here, Plaintiffs meet their burden on this prong because they

seek to use their broad statutory authority over State shore protection efforts to advance a crucial project in the national, State, and local interests and to abate a public nuisance that threatens the safety and property of LBI residents and the State's economic well-being.<sup>6</sup>

A. The DEP Has Broad Authority "To Undertake Any and All Actions and Work Essential" to the Completion of Shore Protection Projects.

The State's right to enter private property to build and maintain shore protection projects is well-settled. N.J.S.A.

12:6A-1 authorizes and empowers the DEP to:

repair, reconstruct, or construct bulkheads, seawalls, breakwaters, groins, jetties, beachfills, dunes and any or all appurtenant structures and work, on any and every shore front along the Atlantic ocean, in the State of New Jersey . . . to prevent or repair damage caused by erosion and storm, or to prevent erosion of the shores and to stabilize the inlets or estuaries and to undertake any and all actions and work essential to the execution of this authorization and the powers granted hereby. [N.J.S.A. 12:6A-1] [emphasis added].

It is also well-settled that statutes intended for "the protection of the public health and public welfare, [are] entitled to a liberal construction for the accomplishment of its obvious beneficent objective." Dep't of Env'tl. Prot. v. Alden Leeds, 153 N.J. 272, 284-85 (1998) (quoting Dep't of Health v.

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<sup>6</sup> The duty of protecting the public interest is vested by common law in the attorney general. See State ex rel. Board of Health v. Sommers Rendering Co., 66 N.J. Super. 334, 341 (App. Div. 1961).

Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 382 (App. Div. 1968), aff'd o.b., 53 N.J. 248 (1969)); see also In re Vulcan Materials Co., 225 N.J. Super. 212, 220 (App. Div. 1988); Lom-Ran v. Dep't of Env'tl. Prot., 163 N.J. Super. 376, 384 (App. Div. 1978).

Here, consistent with its broad statutory authority under N.J.S.A. 12:6A-1, DEP seeks access to the dune areas on Defendants' properties as necessary for Project construction. The Project cannot go forward in the Surf City Northern Project Area without access to Defendants' properties by December 1, 2006. (Rosenblatt Cert. ¶ 61.) In addition, Defendants' refusal to grant access to their properties may jeopardize future funding of the Project, thereby leaving developed areas throughout LBI vulnerable to storm damage. (Rosenblatt Cert. ¶¶ 31, 35, 58, 61.)

As DEP's statutory authority to construct this shore protection project is clear, and immediate access to the Defendants' properties is "essential to the execution" of that authority, N.J.S.A. 12:6A-1, DEP's legal right to access these properties to perform the beach replenishment work necessary to protect LBI and its residents from the serious threat from coastal storms is clear.

B. The DEP Must be Permitted Entry to Abate a Public Nuisance.

In furtherance of its statutory authority under N.J.S.A. 12:6A-1, the DEP seeks access to the Defendants' properties to abate what is, in effect, a public nuisance - i.e., a dune and beach system that provides inadequate protection from coastal storms that are a real and serious threat to Long Beach Island. It is well within the State's police power to remedy this significant interference with public safety to protect the well-being of residents of LBI and the State.

A public nuisance is "an unreasonable interference with a right common to the general public." James v. Arms Tech., Inc., 359 N.J. Super. 291, 329 (App. Div. 2003) (quoting Restatement (Second) of Torts § 821B(1)). As explained in Arms Tech, the Restatement (Second) of Torts also provides:

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

[Arms Tech., supra, 59 N.J. Super. at 329-30 (quoting Restatement (Second) of Torts § 821B(1))].

New Jersey courts take a broad view of the types of circumstances that constitute a public nuisance. See, e.g., Dep't of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 493 (1983) (finding liability under common-law public nuisance against corporations for dumping toxic mercury and for allowing the dumping); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 370 N.J. Super. 171, 185-86 (App. Div. 2004), aff'd, 185 N.J. 40 (2005) (endorsing view that "interruption of free access to the sea is a public nuisance"); Arms Tech., supra, 359 N.J. Super. at 306, 330-31 (finding that plaintiffs stated a claim for public nuisance based on allegations that the activities of gun manufacturers and distributors led to increased crime and fear in the community); Hartman v. Brigantine, 42 N.J. Super. 247, 260 (App. Div. 1956) ("The mounds or piles were, under the circumstances, an obstruction and a dangerous condition on a public highway tantamount to a public nuisance."), aff'd, 23 N.J. 530 (1957).

New Jersey courts also recognize the broad discretion that government officials may exercise to abate a public nuisance in a wide range of circumstances. For example, in Bernardsville Quarry v. Borough of Bernardsville, 129 N.J. 221 (1992), the

Court upheld a municipal ordinance imposing a licensing requirement for quarry operations and limiting the depth below which property could not be quarried. Id. at 224, 230. The Court found that "even though the quarrying of property may not be unlawful as such or, indeed, constitute an actual nuisance, it can have harmful impacts on the public welfare, sufficient to justify a protective governmental response to limit, reduce, or even prevent such activity." Id. at 236.<sup>7</sup>

Similarly, in Apartment House Council v. Ridgefield, 123 N.J. Super. 87 (Law Div. 1973), aff'd o.b., 129 N.J. Super. 192 (App. Div. 1974), the court upheld a municipal ordinance requiring owners of multiple dwellings to post security with a commission that was authorized to use these funds to remedy conditions in apartments where landlords failed to address hazardous or unhealthy conditions. Id. at 89-90. The court found that the order was a proper response to conditions amounting to a public nuisance, stating: "It takes no stretch of legal reasoning to realize that the conditions outlined in this statute constitute what has long been described as 'public

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<sup>7</sup> The Court also noted that "the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." Bernardsville Quarry, supra, 129 N.J. at 236 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492, 107 S.Ct. 1232, 1246, 94 L.Ed.2d 472 (1987)).

nuisance,' a condition which has always been within the police power of localities to abate in a summary fashion." Id. at 97.

Governmental authority to use police powers to abate public nuisances, either by the enactment of legislation or by summary action, has been affirmed by New Jersey courts on numerous other occasions. See, e.g., Kessler v. Tarrats, 191 N.J. Super. 273, 293 (Ch. Div. 1983) (citing Lawton v. Steele, 152 U.S. 133, 136, 14 S.Ct. 499, 500, 38 L.Ed. 385 (1894) ("The term 'police power' has been said 'to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.'")), aff'd, 194 N.J. Super. 136 (App. Div. 1984); Ajamian v. North Bergen Tp., 103 N.J. Super. 61, 72-75 (Law Div. 1968) (upholding the right summarily to order residents to vacate a building deemed a hazard to health and safety without a judicial proceeding, under the common law right to abate a nuisance summarily in the absence of statute), aff'd o.b., 107 N.J. Super. 175 (App. Div. 1969), cert. denied, 398 U.S. 952, 90 S.Ct. 1873, 26 L.Ed.2d 292 (1970). Cf. Usdin v. Dep't of Env'tl. Prot., 173 N.J. Super. 311, 331 (Law Div. 1980) ("It seems clear that the DEP regulations are aimed to prevent injury during flooding to potential employees of the warehouse or materials which may be stored to other nearby citizens whose lives or property may be endangered by stored items being swept

along in a flood and to all residents who might drink water polluted because the stored items have entered an aqueduct or aquifer."), aff'd, 179 N.J. Super. 113 (App. Div. 1981).

Here, the DEP has determined that the LBI Shore Protection Project serves a vital State interest by protecting New Jersey's coastal inhabitants and the State's economy from the threat of coastal storms.<sup>8</sup> To protect this interest, the Attorney General and the DEP seek to invoke their police powers to abate the public nuisance that will persist unless it can gain access to all properties in the Northern Surf City Project Area.

At present, Defendants are maintaining their properties in a manner inadequate to protect LBI and its residents from the high risk of storm damage. Defendants' refusal to grant access for work in the Northern Surf City Project Area interferes with the rights of other property owners in this area who wish to obtain the storm-protection and erosion-control benefits of the Project because the Project cannot go forward in this area without access to Defendants' properties. (Rosenblatt Cert. ¶ 54.) In addition, Defendants' refusal to grant access to their properties may jeopardize future funding of the Project, thereby leaving developed areas throughout LBI vulnerable to storm damage. (Rosenblatt Cert. ¶ 58.)

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<sup>8</sup> Congress has similarly determined that the LBI Shore Protection Project is in the national interest. See 33 U.S.C. § 426e(a); WRDA of 2000, Pub. L. No. 106-541, 114 Stat. 2572.

Plaintiffs seek access to Defendants' properties to remedy this threat to public health and public safety through construction of the Project. Thus, this Court should allow Plaintiffs to exercise their broad authority over these matters by granting DEP the access required for the beach replenishment work necessary to protect the State and its residents from the threat of coastal storms.

**III. PLAINTIFFS HAVE DEMONSTRATED A REASONABLE PROBABILITY OF ULTIMATE SUCCESS ON THE MERITS**

A plaintiff seeking a temporary injunction is also required to demonstrate a reasonable probability of ultimate success on the merits. Here, Plaintiffs satisfy this prong because the material facts that support the Plaintiffs' need for access are not in dispute, and, as set forth above, the legal authority to grant the requested relief is clear.

Plaintiffs' legal claims for access to Defendants' properties rest on a few, well-established facts. First, Long Beach Island, a narrow barrier island in Ocean County stretching approximately eighteen miles along the Atlantic Ocean, is subject to constant erosion, thereby damaging a valuable natural resource of all of the citizens of the State and threatening the safety and property of five coastal municipalities and their residents. (Herrington Cert. ¶ 10.)

Second, the LBI Shore Protection Project has been authorized as within the local, State, and national interests and is a necessary response to the threats facing LBI from coastal storms. (Rosenblatt Cert. ¶¶ 19, 35.) The Project will begin in Surf City, based on the Army Corps' and the DEP's evaluation of various factors relevant to the successful completion of the Project. (Rosenblatt Cert. ¶ 34, 35, 36.)

Third, the Army Corps requires DEP to provide access to the properties where the work will be performed, both for initial construction and subsequent replenishment activities, and perpetual storm damage reduction easements granting public use of the footprint of the project. (Rosenblatt Cert. ¶¶ 29, 39, 40.)

Finally, although the Borough of Surf City and twenty private property owners have voluntarily provided the necessary easements granting access, the five Defendants have not. (Rosenblatt Cert. ¶¶ 43, 54.) Without access to these five properties by December 1, 2006, the Project cannot proceed in this area and future funding of the Project is jeopardized. (Rosenblatt Cert. ¶ 61.)

These facts spell out the compelling need for the DEP to obtain immediate access to the Defendants' properties so that the DEP and the Army Corps can fully and effectively complete construction on the first phase of the LBI Shore Protection

Project. As the material facts cannot legitimately be disputed, and the legal authority to address them is clear, Plaintiffs have established a reasonable likelihood of ultimate success on their claims.

IV. PLAINTIFFS HAVE DEMONSTRATED THAT THE BALANCE OF HARDSHIPS FAVORS GRANTING THE INJUNCTION

Finally, a plaintiff seeking a temporary injunction is required to demonstrate that the balance of hardships favors granting the injunction. Here, Plaintiffs satisfy this prong because the relative balance of hardships strongly favors granting relief to the State.

The hardships facing the State and its residents are severe. If access is not granted, the Project will not proceed in the manner designed to provide the maximum protection possible to LBI. If the Corps is unable to complete the entire stretch of Surf City this fall/winter, portions of LBI that could receive beach nourishment immediately will go unprotected, continuing to expose residents to the risks from coastal storms. (Rosenblatt Cert. ¶ 58.) This hardship will be felt most immediately by the twenty of the twenty-five property owners in the Northern Surf City Project Area who have voluntarily signed the required easements, as well as those residents inland from the Project area. Further, any future funding of this much-needed project on LBI will be in jeopardy. (Ibid.)

In contrast, the hardships facing Defendants should access be granted are minimal. The construction activities on the Surf City properties constitute a minor intrusion on a small portion of their properties on existing dunes. (Rosenblatt Cert. ¶ 55.) And, importantly, any minimal hardship experienced by Defendants is outweighed by the benefits they will receive from the Project, since it is the owners of oceanfront property who will benefit most directly from the storm protection offered by the Project. (Herrington Cert. ¶ 23.)

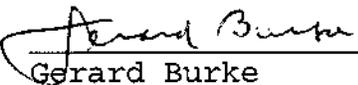
Thus, when the significant hardships facing the State are weighed against the minimal hardship experienced by Defendants, particularly in light of the benefits received by Defendants, it is clear that the balance of hardships tilts decidedly toward Plaintiffs.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' request for immediate access to Defendants' properties to allow the LBI Shore Protection Project to proceed.

Respectfully submitted,

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